80-1716

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No. _____

IN THE

Supreme Court of the United States

October Term, 1980

JOHN LaBOVE, ET UX,

Appellants

vs.

THE CITY OF GROVES

Appellees

On Appeal From the Supreme Court of Texas

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Is the requirement of the Groves City Code that Notice to the city of a claim against the city be verified in violation of the Constitution of the United States, specifically the due process and equal protection clause of the Fourteenth Amendment?

IN THE

SUPREME COURT OF THE UNITED STATES

* * *

October Term, 1980

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JOHN LaBOVE, ET UX,

Appellants

VS.

THE CITY OF GROVES,

Appellees

* * *

ON APPEAL FROM THE SUPREME COURT OF TEXAS

* * *

JURISDICTIONAL STATEMENT

JOHN LaBOVE, ET UX, the appellants, appeal from the judgment of the Supreme Court of Texas on a Writ of Error Motion for Rehearing entered on December 10, 1980 holding that the ordinance of the City of Groves, Texas, requiring verified notice does not violate the equal protection clause of the Fourteenth Amendment of the United States Constitution.

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28 U.S.C. 1257(2)

OPINION BELOW

The opinion of the Supreme Court of Texas is not reported. The opinion of the Ninth Court of Civil Appeals is reported in 602 SW.2d. Copies of both opinions are attached hereto as appendix "A".

JURISDICTION

This action was filed as an original action in the District Court of Jefferson County, Texas, entered October 29, 1980. A Motion for Rehearing was entered December 10, 1980, and Notice of Appeal was given on February 27, 1981.

QUESTION PRESENTED

Is the requirement of the Groves City Code that Notice to the City of a claim against the city be verified in violation of the Constitution of the United States, specifically the due process and equal protection clause of the Fourteenth Amendment?

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, United States Constitution:

(N)or shall any state ... deny to any person within its jurisdiction equal protection of the laws.

STATUTES INVOLVED

GROVES CODE: Art. XVIII, 12, Section 12

Notice of Claims:

Before the City of Groves shall be liable for damages for the death or personal injuries of any person or for damage to or destruction of property of any kind, the person injured, if living or his representative, if deceased, or the owner, his agent, or attorney of the property damaged or destroyed shall, give the City Council notice in writing of such death, injury, damage or destruction, duly verified by affidavit, within sixty (60) days after same has been sustained, stating specifically in such written notice when, where, and how the death, injury, damage, or destruction occurred, and the apparent extent of any such injury, the

amount of damages sustained, the actual residence of the claimant by street and number at the date the claim is presented, the actual residence of such claimant for six (6) months immediately preceding the occurrence of such death, injury, damage, or destruction, and the names and addresses of all witnesses upon whom it is relied to establish the claim for damages; and, the failure to so notify the Council within the time and manner specified herein shall exonerate, excuse and exempt the City from any liability whatsoever. No act of any officer or employee of the City shall waive compliance, or estop the City from requiring compliance, with the provisions of this section as to notice. (Ord. No. 372,1,9-18-67)

STATEMENT OF THE CASE

Appellants sued appellees as a result of injuries received when their automobile traveling over a city street of appellee caught fire as a result of passing over a partially

uncovered manhole. Appellants gave written notice to appellee of the accident. Said notice was not verified as required by the City Ordinance of appellee. In the trial court appellee moved for and was granted a summary judgment on the basis that the notice to appellee was not verified. Appellants perfected their appeal to the Ninth Court of Civil Appeals where after submission and argument, the case was affirmed, saying the judgment of the trial court was correct. Appellants then sought rehearing in the Court of Civil Appeals which was denied. Lastly, appellants filed on application for writ of error in the Supreme Court of Texas which was refused October 29, 1980 in a per curiam opinion. Appellants sought a rehearing before the Supreme Court of Texas on the basis that the appellants have been denied equal protection of the laws under the 14th Amendment to the Constitution of the United States which was overruled on December

lo, 1980, without written opinion.

THE FEDERAL QUESTION IS SUBSTANTIAL

The questions presented on this appeal have never been passed upon by this Court. With the status of sovereign immunity as it exists today with respect to municipalities the question is important to municipal tort feasors and to claimants proceeding against municipal tort feasors.

By upholding the requiring of a verified notice to a municipality the Courts of Texas have arbitrarily split the classes of tort feasors into sub-classes and are denying equal protection of the laws to claimants against municipal tort feasors.

CONCLUSION

For the reasons stated above, this Court should note probable jurisdiction of this of this appeal.

Respectfully submitted,

LOUIS DUGAS, JR.
Attorney for Appellants
1804 N. 16th Street
Orange, Texas 77630

OPINION OF THE COURT OF CIVIL APPEALS
NINTH SUPREME JUDICIAL DISTRICT
BEAUMONT, TEXAS

NO. 8494

JOHN LABOVE, ET UX APPELLANTS

V.

THE CITY OF GROVES APPELLEE

Plaintiffs below appeal from an adverse summary judgment rendered in their suit for property damage and personal injuries sustained by Mrs. LaBove when their automobile struck a partially open manhole. The accident is alleged to have occurred on July 16, 1976, and suit was filed on September 1, 1977. It charged common law negligence on the part of the city in failing to secure the manhole cover so that it would not protrude upward from the pavement, and failure to inspect the manhole cover to determine the unsafe condition thereof.

The defendant duly answered, pleading plaintiffs' failure to comply with the 60-day notice provision of its charter. In substance,

the charter required a claimant to give verified written notice within sixty day of the accident including therein the names of witnesses, the extent of injury, etc., as a condition precedent to liability on the part of the city.

Thirteen days after the alleged accident plaintiffs' counsel wrote a letter to the "Manager of the City of Groves" advising that official of the occurrence. The letter was not verified and did not in any manner comply with the charter provision noted earlier. The original pleading of plaintiffs did not contain any allegation of compliance with the notice provision of the charter.

City's motion for summary judgment, filed on January 15, 1979, was supported by the affidavit of its City Manager that no other notice had been filed except the single letter from plaintiffs' counsel. Plaintiffs' controverting affidavit alleged that the manhole exploded and that city's police, fire, sewer, and water

department employees were at the scene within minutes and "repaired the man-hole while we were still at the scene of the occurrence." There were no pleadings supporting the facts so presented.

On November 21, 1979, plaintiffs filed their first amended original petition wherein, for the first time, they sought recovery under the Tort Claims Act, TEX. REV. CIV. STAT. ANN. art. 6252-19 (1970) and as amended (Supp.1980). Again, there were allegations that the protruding manhole cover presented danger to vehicles on the street. A very general allegation was made to the effect that the street and the manhole and its cover were under the exclusive management and control of city, attempting to invoke the doctrine of res ipsa loquitur.

No allegations as to notice in compliance with the charter or actual notice were contained in this amended pleading.

The appeal is upon two points of error

which we will consider in inverse order of presentation. The first contention is that the city was performing a "governmental function and thus the 'actual notice' provisions of Section 16" of the Tort Claims Act apply. We disagree. The allegations of the pleading and the summary judgment proof disclose that the defect was in the public street--the protruding manhole cover being a defect in the street. The very recent case of Turvey v. City of Houston, _____ S.W.2d ____ (not yet reported except as 23 Tex. Sup. Ct. Jrl 447, 448, June 18, 1980), is dispositive. There, Justice Barrow restated the fundamental rule that the maintenance of streets, including the duty to warn of a defect therein, is a proprietary function; and (at 449) "the City is not liable under the Texas Tort Claims Act for the negligent acts arising out of the performance of its proprietary functions." The second point of error is overruled.

In the first point, plaintiffs contend

that there was a fact question presented as to whether the city "is subject to the defense of estoppel." Plaintiffs have filed to point to any record showing of any facts which would raise an inference of estoppel. Rather, the argument is made that since the city had actual knowledge of the accident though its police and fire departments, the formal notice required by the charter was not required. We disagree.

In Wagstaff v. City of Groves, 419 S.W.2d 441, 442 (Tex. Civ. App. -- Beaumont 1967, writ ref'd n.r.e.), this Court held that compliance with the same charter provision was a condition precedent to suit against the city for injury. We construed an almost identical charter provision in Bowling v. City of Port Arthur, 522 S.W.2d 270, 272-273 (Tex. Civ. App. -- Beaumont 1975, writ ref'd n.r.e.). Afer considering most of the cases relied upon by plaintiffs, we held that an unverified notice was legally insufficient and noted that

in that case, as in the case at bar, there was no pleading of estoppel. We denied a recovery in Bowling and the authorities relied upon there demand a similar result here.* See and compare City of Houston v. Deshotel, 585 S.W.2d 846, 849 (Tex. Civ. App. -- Houston [1st Dist.] 1979, no writ), citing and quoting from Bowling, supra.

After reviewing the record with great care, we find no merit to either point brought forward; consequently, the judgment of the trial court is AFFIRMED.

Quentin Keith
Justice

Opinion delivered
July 3, 1980
Justice Clayton not participating

* In McDonald v. City of Houston, 577 S.W. 2d 800, 802 (Tex. Civ. App. -- Houston [14th Dist] 1979, writ ref'd n.r.e.), relied upon by plaintiffs, Bowling was cited for the very

point mentioned above. We do not attempt to explain the result reached in McDonald. We do, however, note that apparently the only defect in the notice there was a lack of verification whereas in Bowling and here, there were many deficiencies. Moreover, plaintiffs here had no pleading of notice, waiver thereof, or of estoppel. We do not find McDonald applicable to our case.

IN THE SUPREME COURT OF TEXAS

NO. B-9737

JOHN LaBOVE, ET UX.,	X	
	X	
Petitioners	X	
v.	X	FROM JEFFERSON
	X	COUNTY
THE CITY OF GROVES,	X	NINTH DISTRICT
	X	
Respondent	X	

PER CURIAM

This cause was filed by John LaBove and wife to recover damages from the City of Groves as a result of their automobile striking a manhole cover in a city street. The trial court granted City's motion for summary judgment because of the failure of petitioners to give the notice required by the City Ordinance. The court of civil appeals affirmed. 602 S.W.2d 395.

In Roberts v. Haltom City, 543 S.W.2d 75 (Tex. 1976), we held that a city may be estopped by the conduct of its officials from asserting failure of compliance with the notice of claim requirement of the city ordinance.

That issue is not presented here because petitioners did not plead or otherwise raise the issue of estoppel in a written answer or response to City's motion for summary judgment. See Rule 166-A(c), Texas Rules of Civil Procedure, as amended effective January 1, 1978; City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671 (Tex. 1979).

The application for writ of error is refused, no reversible error.

Opinion Delivered: October 29, 1980.

CLERK'S OFFICE - SUPREME COURT

Dec. 10, 1980

Austin, Texas,

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of No. B-9737, JOHN LABOVE ET UX. vs. THE CITY OF GROVES was this day OVERRULED.

Very truly yours,

GARSON R. JACKSON,
Clerk

NO. B9737

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

JOHN LABOVE, ET UX

VS.

THE CITY OF GROVES

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY JOHN LABOVE, ET UX

Notice is hereby given that JOHN LABOVE, ET UX hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court for the State of Texas entered on the 29th day of October, 1980, affirming the Court of Civil Appeals decision and denial of rehearing in said case entered by the Supreme Court of the State of Texas, pursuant thereto entered on December 10, 1980. This appeal is taken pursuant to 28 U.S.C. 1257(2).

By their Attorney,

LOUIS DUGAS, JR.
Attorney at Law
1804 North 16th St.
Orange, Texas 77630
Ph. 713/883-3506

All

IN THE

SUPREME COURT OF THE UNITED STATES

* * *

October Term, 1980

* * *

NO. _____

* * *

JOHN LaBOVE, ET UX,

Appellants

VS.

THE CITY OF GROVES,

Appellees

* * *

CERTIFICATE OF SERVICE

LOUIS DUGAS, JR., hereby certifies that he is a member of the bar of the Supreme Court of the United States and counsel for JOHN LABOVE, ET UX, Appellant in the above matter; and that a true and correct copy of the above and foregoing Jurisdictional Statement has been mailed to the attorney for Appellee, the Honorable Michael McGown at

Weller, Wheelus, and Green, Suite 818, Beaumont Savings Building, Beaumont, Texas, 77701 by mail, postage prepaid, on this the 9th day of March, 1980.

Louis Dugas, Jr.